Supreme Court, U.S.
FILED

06-856 NOV 6 - 2006

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No. 06-

In The

Supreme Court of the United States

James LaRue, Petitioner

v.

DeWolff, Boberg & Associates, Inc.; and DeWolff, Boberg & Associates, Inc., Employees' Savings Plan

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."

The First Question Presented is:

Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?[1]

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * * to redress * * * violations" of the statute.

The Second Question Presented is:

Does § 502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?[2]

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[1] Hereinafter, this will be referred to as the "§ 502(a)(2) Question."

[2] Hereinafter, this will be referred to as the "§ 502(a)(3) Question."

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James LaRue ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "court of appeals") in this case.

OPINIONS BELOW

The original opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 450 F.3d 570. Petitioner requested rehearing and rehearing *en banc*, and the United States Department of Labor filed a brief *amicus curiae* in support. The order denying rehearing (Pet App. 22a-29a) is published at 458 F.3d 359. The order and opinion of the district court granting respondents' motion for judgment on the pleadings (Pet. App. 15a-21a) and the order of judgment dismissing petitioner's complaint (Pet. App. 30a-31a) are unpublished.

JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and rehearing *en banc* (Pet. App. 22a-29a) on August 8, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 are reproduced at Pet. App. 32a-35a: 29 U.S.C. 1002(1); 1002(2A); 1002(3); 1002(34); 1002(35); 1104(a)(1)(B); 1000; 1132(a)(2), and 1132(a)(3).

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates "employee benefit plans." 29 U.S.C. 1002(3) (noting that "employee benefit plans" include "employee pension benefit plans" and "employee welfare benefit plans").[1] The term "employee

[1] For a discussion of "employee welfare benefit plans" *see n.*8, *infra.*

pension benefit plan" encompasses two types of retirement plans: "defined benefit plans"[2] and "defined contribution plans."[3]

> A defined benefit plan promises a specified monthly benefit at retirement.
>
> * * *
>
> A defined contribution plan, on the other hand, does not promise a specific amount of benefits at retirement. In these plans, the employee or the employer (or both) contribute to the employee's individual account under the plan * * * These contributions generally are invested on the employee's behalf. The employee will ultimately receive the balance in their account, which is based on contributions plus or minus investment gains or losses. The value of the account will fluctuate due to the changes in the value of the investments. Examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans.[4]

In the three decades since ERISA was enacted, the composition of employee pension benefit plans has overwhelmingly changed:

> While the number of defined benefit pension plans has declined, the number of 401(k) plans has grown

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[2] 29 U.S.C. 1002(35).

[3] 29 U.S.C. 1002(34). A "defined contribution plan" is also known as an "individual account plan." *Id.*

[4] United States Department of Labor Website at http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited on November 1, 2006).

> dramatically. Section 401(k) of the Internal Revenue Code did not exist in 1974, and plans named for this tax code section did not really begin their growth until the early 1980's. In just over two decades, there are now an estimated 250,000 401(k) plans, covering 42 million workers, and holding an estimated $2 trillion in assets.[5]

According to the latest available government data, approximately $3 trillion in assets—more than half of all private pension plan funds—are currently held in defined contribution plans.[6]

2. Section 502(a) of ERISA is entitled "Civil enforcement." This section sets forth the exclusive remedies that are available to a civil litigant under the statute.[7] The importance of section 502(a) can hardly be overstated: the extraordinary breadth of subject matter covered by the ERISA statute coupled with an extremely strong ERISA

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[5] Testimony of Mr. Erik Olson, Board Member of AARP before the 107th Congress on February 27, 2002 at http://edworkforce.house.gov/hearings/107th/eer/enronfour22702/olsen.htm (last visited on November 5, 2006).

[6] Board of Governors of the Federal Reserve System, *Flow of Fund Accounts of the United States: Flows and Outstandings, Second Quarter 2006*, Statistical Release Z.1., at 113 (September 19, 2006) at http://www.federalreserve.gov/releases/Z1/Current/z1.pdf (last visited on November 3, 2006) ("Federal Reserve Statistics").

[7] *See e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.")

preemption doctrine have resulted in the reality that § 502(a) provides the only means for the remediation of most wrongs suffered in the employee benefits or health care context.[8] As such, it is not surprising that this Court has decided several statutory interpretation cases involving the precise scope of § 502(a).[9]

Specifically, § 502(a) "contains a six-part list of remedies, of which the final three, subsections (4)-(6), are peripheral. Subsections (1)-(3) * * * constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought."[10] The questions

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[8] As explained in n.1, *supra*, ERISA covers all "employee benefit plans" as well as all "employee welfare benefit plans. An "employee welfare benefit plan" is defined as one that provides employees with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. 1002(1). As of 2002, 137 million workers, retirees, and their families were covered by such plans. *See* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, (CA6 2004). Almost all health insurance in the United States—except for Medicare—is provided through employer-sponsored plans and is thus subject to ERISA. *See* Loraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizeing Claims for Patients' Rights*, 42 Brandeis L.J. 529, 538 (2004).

[9] *See e.g.*, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (interpreting 502(a)(2)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (interpreting 502(a)(3)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (same); *Sereboff et ux. v. Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 1869 (2006) (same).

[10] John T. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail Of Error In* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted) ("Langbein").

presented by this petition involve the interpretation of subsections (2) and (3).[11]

Section 502(a)(2) "is restricted by its terms to actions invoking fiduciary liability under ERISA § 409(a). Section 409(a) provides for recovery by the plan, not the participant or beneficiary who brings suit. (The participant or beneficiary benefits indirectly, through the enhanced value of the plan.) Section 409 authorizes recovery for 'any losses' and 'any profits,' and it further subjects the breaching fiduciary to 'such other equitable or remedial relief as the court may deem appropriate'"[12]

Section 502(a)(3) is a "'catchall' provision, in the sense that section 502(a)(3) 'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy.'"[13]

3. Petitioner is a participant in the DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan (the "DeWolff Plan"), a 401(k) plan administered by DeWolff, Boberg & Associates, Incorporated ("DeWolff"). Pet. App. 2a. Like many defined contribution plans, the DeWolff Plan "permits participants who so desire to manage their own accounts by selecting from a menu of various investment options." *Id.*

On June 2, 2004, petitioner filed a civil action against DeWolff and the DeWolff Plan (together "respondents"). Pet. App. 15a. In his lawsuit, petitioner alleged that

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[11] "Section 502(a)(1) is the workhorse of ERISA remedy law, the provision under which routine benefit denial and other ERISA claims proceed." Langbein, *supra* n.10 at 1334 (footnotes omitted). It is not involved in this case.

[12] Langbein, *supra* n.10 at 1334-35 (footnotes and citation omitted).

[13] Langbein, *supra* n.10 at 1335 (footnotes omitted) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)).

respondents breached their duties to him under ERISA by failing to implement the investment strategy he had selected for his employee retirement account. Pet. App. 2a-3a, 15a. As compensation, petitioner requested that respondents return to his retirement account the amount by which it would have appreciated had defendants followed his instructions. Pet. App. 3a, 21a.

On February 2, 2005, respondents filed a motion for judgment on the pleadings claiming that the relief sought by petitioner for the alleged breach of fiduciary duty was not available under § 502(a) of ERISA. Pet. App. 16a. On June 23, 2005, a federal district court in South Carolina granted respondents' motion for judgment on the pleadings. Pet. App. 15a-21a. Petitioner filed a timely appeal to the Fourth Circuit. After full briefing and argument, the Fourth Circuit issued a published opinion on June 19, 2006. In this opinion, the court summarized the two questions presented as follows:

> The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of * * * ERISA, 29 U.S.C. 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.
>
> We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S.

28 (1993) and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here.[14]

Petitioner timely filed a petition for rehearing and rehearing *en banc*. The United States Department of Labor filed a brief *amicus curiae* in support. On August 8, 2006, the Fourth Circuit issued an order in which it rejected the arguments presented by the United States Department of Labor and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition squarely presents two related questions regarding section 502(a) of ERISA that have divided and confounded the courts of appeal. These unresolved questions are constantly recurring and their extraordinary importance has been openly acknowledged by the United States Solicitor General, the United States Department of Labor, as well as several notable commentators and jurist including members of this Court.

The sheer number of Americans and amount of money potentially affected by the resolution of the two questions presented render them as significant as the sentencing issues in *United States v. Booker*, 543 U.S. 220 (2005) and the damages issue in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This petition presents an ideal opportunity for resolution by this Court.

Certiorari should be granted.

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[14] Pet. App. 2a.

I. The §502(a)(2) Question Warrants Further Review.

Section 502(a)(2) of ERISA provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title"[15] which, in turn, provides that:

> a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.[16]

Petitioner in this case is a participant in a 401(k) plan. He has alleged that respondents, the plan and its fiduciary, breached the "duties imposed upon fiduciaries by [section 1104 of] this subchapter" when they "failed to invest his money as directed."[17] As remediation for this breach, petitioner sought that respondents "make good to [the] plan" the losses that resulted.[18]

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[15] 29 U.S.C. 1132(a)(2).

[16] 29 U.S.C. 1109 (*i.e.*, § 409 of ERISA).

[17] Pet. App. 15a. 29 U.S.C. 1104 (*i.e.*, § 404 of ERISA) is entitled "Fiduciary duties." Section 404(a)(1)(A) imposes a duty of loyalty by requiring that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries." 29 U.S.C. 1104(a)(1)(A). Section 404(a)(1)(B) imposes a duty of prudence by requiring that a fiduciary exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." 29 U.S.C. 1104(a)(1)(B).

[18] As the district court noted in its opinion, "Plaintiff 'does not wish for the court to award him any money, but * * * simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty.'" Pet. App. 21a (quoting Petitioner's briefing before the district court). As the United States observed below:

In affirming the district court's granting of respondents' motion for judgment on the pleadings, the Fourth Circuit reasoned as follows:

> It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him. We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan, in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan. But such a view finds no license in the statutory text.[19]

> The ultimate allocation of the losses to LaRue's plan account does not defeat their status as "losses to the plan." All losses recovered by individual account plans are necessarily allocated between individual accounts. * * * [As] earnings and losses occur within particular investments, these amounts 'are allocated to the participants' accounts' through accounting or bookkeeping entries.

Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Petition for Rehearing and Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et al.*, 450 F.3d 570 (July 12, 2006) (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993)) at 5 ("U.S. Br.").

[19] Pet. App. 6a.

As explained herein, further review of the 502(a)(2) Question is warranted for three reasons. First, the ability of participants in "defined contribution plans" to bring suit under § 502(a)(2) to recover losses caused by breaching fiduciaries "is of exceptional importance."[20] Second, the Fourth Circuit's dramatic limitation, or elimination, of the ability of participants in "defined contribution plans" to recover losses under § 502(a)(2) is "unsupported under the statute."[21] Finally, the Fourth Circuit's resolution of the 502(a)(2) Question "conflicts with the decisions of every other court of appeals to have addressed the issue."[22]

A. As the United States noted below, the § 502(a)(2) Question "is of exceptional importance."

For most participants in "defined contribution plans," filing a civil action under § 502(a)(2) is the only means through which pension account losses caused by the misconduct of a fiduciary might ever be recovered. State law claims against a breaching fiduciary are preempted by ERISA, and "make-whole" (*i.e.*, compensatory) monetary relief under § 502(a)(3) is currently unavailable in most circuits. It was this very point that the United States impressed on the Fourth Circuit below when it observed that:

> At a minimum, combined with ERISA's preemptive effect and the panel's holding that no monetary relief is available under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the decision leaves LaRue, and individual plaintiffs like him, without any means

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[20] U.S. Br. at 4.

[21] *Id.*

[22] *Id.* at 11-12.

whatsoever to recover losses caused even by the most egregious fiduciary breaches.[23]

Under the Fourth Circuit's interpretation of 502(a)(2), the breaching fiduciary of a "defined contribution plan" will now enjoy total immunity from personal liability for monetary losses caused by even the most egregious violation of ERISA provided that the fiduciary's misconduct has only depleted the retirement funds of a single participant in the plan.

As this case should illustrate, the risk of "single-participant" monetary losses resulting from fiduciary breach inheres in a "defined contribution plan." These plans are necessarily comprised of an individual account for each participant, and their fiduciaries must regularly discharge duties that could—if performed imprudently in violation of § 404(a)(1)(B) of ERISA—result in losses to the account of an individual participant (*e.g.*, the improper execution of investment instructions; the failure to provide material information; the negligent provision of financial advice, etc.). Any one of these acts might cause an individualized injury either because it was directed at, or relied upon by, only one plan participant.[24] Similarly, the fiduciary of a "defined

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[23] U.S. Br. at 1-2. It is worth noting that the Fourth Circuit's rule will protect breaching fiduciaries not only from injured plan participants but from the United States as well: "The Secretary of Labor brings many cases [under § 502(a)(2)] annually * * * and takes the position that if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language. Because there is no principled way to distinguish between the wrongful failure to pay a single participant's contribution into a plan and the wrongful failure to carry out a single participant's directed investment instructions, under the panel's decision, suit a suit presumably would be precluded." U.S. Br. at 7-8.

[24] Although the 401(k) plan at issue in this case was administered by "a nationwide management consulting firm," Pet. App. 2a, there are undoubtedly countless "defined contribution plans" that have substantially fewer participants. Presumably, participants in small plans

contribution plan" could engage in deliberate conduct—in violation of § 404(a)(1)(A) of ERISA—that results in individual losses (*e.g.*, looting the account of a hapless participant; engaging in a self-dealing transaction with an individual participant, etc.).[25]

As noted earlier, *approximately $3 trillion in assets*—more than half of all private pension funds in this country—are currently held by defined contribution plans like the 401(k) plan in this case. Put simply, the importance of this issue cannot be ignored.

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are even more susceptible to suffer the type of individualized injury that is no longer remediable under the Fourth Circuit rule.

[25] Moreover, the United States correctly points out that:

> Although this case involves a single plan participant in a 401(k) plan whose claim for loss is based on the defendants failure to follow his investment directions, there is no clear and logical basis upon which to draw a line between this case and the many other cases involving the recovery of losses stemming from fiduciary breaches that primarily will benefit the accounts of only some defined contribution plan participants.

U.S. Br. at 3. Thus, under the Fourth Circuit's rule, every breaching fiduciary of a "defined contribution plan" who is sued under § 502(a)(2) is now likely to claim absolute immunity from suit under the statute except in the handful of cases in which *every* plan participant has been affected by the breach. That, in turn "is likely to force district courts and this Court to revisit the issue in numerous factual contexts as it attempts to draw the line between permissible and impermissible loss recoveries, despite ERISA's express authorization of the recovery of "any losses to the plan." U.S. Br. at 3.

B. As the United States noted below, the panel's resolution of the § 502(a)(2) Question is "unsupported under the statute."

There is no reason to believe that Congress intended the interpretation of § 502(a)(2) adopted by the Fourth Circuit. As the United States correctly argued below:

> The panel's decision is contrary to the express language of ERISA sections 409 and 502(a)(2), which authorize participants and beneficiaries alleging fiduciary breaches to bring suit to obtain "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). LaRue alleges that, as a direct result of a fiduciary breach, the plan has fewer assets available for the payment of his benefits. If the allegations are true, LaRue is entitled to an order restoring "any losses" to the plan.[26]

In reaching its holding regarding § 502(a)(2), the Fourth Circuit did not point to a single statutory requirements that petitioner failed to satisfy. To the contrary, the court of appeals noted that:

> To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan.[27]

As the United States explained in their brief *amicus curiae*, there is nothing "narrow" about the view that petitioner sought the restoration of "losses *to the plan*." Petitioner's request for relief under § 502(a)(2) can *only* be viewed as

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[26] U.S. Br. at 2.

[27] Pet. App. 6a.

seeking "losses to the plan." This is true because when dealing with a "defined contribution plan,"

> any "contributions are made to a single funding vehicle," and "[a]s amounts are contributed to the trust," and earnings and losses occur within particular investments, these amounts "are allocated to the participants' accounts" through accounting or bookkeeping entries. Thus, although the plan assets are allocated to individual accounts in this manner, and the individual participant's benefit is ultimately dependent on the amounts so allocated, ownership of the accounts and of the plan's assets never passes, even in part, to participants. Rather, as a matter of statutory design, the participants have a beneficial interest in their accounts, but legal title is held in trust by one or more trustees, who have authority and discretion to manage and control the assets of the plan.[28]

In sum, when petitioner informed the district court that he "simply want[ed] the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty,"[29] that could only be accomplished by the precise procedure set forth in § 502(a)(2)—the payment by respondents (*i.e.*, the breaching fiduciaries) *to the plan*.

Unable to provide any statutory support for its interpretation of § 502(a)(2), the Fourth Circuit instead purported to base its holding on language from this Court's decision in *Massachusetts Mutual Life Insurance Co. v.*

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[28] U.S. Br. 5-6 (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993) and citing 29 U.S.C. 1103(a); 26 U.S.C. 401(a); Rev. Rul 89-52, 1989-1 C.B. 110).

[29] Pet. App. 21a.

Russell, 473 U.S. 134 (1985).[30] The court of appeal's assertion that its § 502(a)(2) holding is compelled by this Court's decision in *Russell*, however, is completely without merit. *Russell* "present[ed] a single, narrow question: whether the §409 "appropriate relief" referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of ***extra-contractual damages*** for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring) (emphasis added).

The plan participant in Russell did not request that the plan's fiduciaries "make good to [the] plan any losses to the plan resulting from each such breach." In fact, she did not even allege that the plan itself lost any value as the result of the fiduciaries' conduct. Instead, she claimed that she personally suffered emotional and physical harm due to an interruption of the payment of benefits and requested that the plan's fiduciaries pay *directly to her damages for mental and emotional distress as well as punitive damages. Id.* at 136-39.

Russell's teaching (*i.e.*, that recoveries under §§ 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," *id.* at 140) can only support the interpretation of § 502(a)(2) urged by petitioner and the United States. In particular, the *Russell* Court's recognition that the focus of § 409 was to prevent the "misuse and mismanagement of plan assets," *id.* at 140 n.8 makes clear that—*in the context of a "defined contribution plan*"—actions like the one filed by Mr. LaRue are precisely what Congress contemplated in enacting § 502(a)(2).

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[30] *See e.g.*, Pet. App. 5a ("Recovery under [502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan) (quoting *Russell*, 473 U.S. at 140) (emphasis added by the Fourth Circuit).

C. As the United States noted below, the panel's resolution of the § 502(a)(2) Question "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits."

As the United States correctly argued in seeking *en banc* review by the Fourth Circuit:

> The panel's decision that 401(k) plan losses that will be allocated to an individual account are not recoverable under section 502(a)(2) is also of exceptional importance because it creates a conflict with the decisions of every other court of appeals to have addressed the issue. (discussing *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (CA3 2005); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338 (CA 5 2005); *Steinman v. Hicks*, 352 F.3d 1101 (CA7 2003), and *Kuper v. Iovenko*, 66 F.3d 1447 (CA6 1995).
>
> * * *
>
> The arguments rejected by the courts of appeals in the cases described above are no different in substance than the argument accepted by the panel here: that a participant may not sue under section 502(a)(2) to recover losses to his defined contribution plan that were caused by fiduciary breaches where the recovered losses will be allocated to his individual account.[31]

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[31] U.S. Br. at 11-14.

II. The § 502(a)(3) Question Warrants Further Review.

Section 502(a)(3) of ERISA authorizes a civil action

> By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[32]

In the seminal case of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court addressed—for the first time—the meaning and scope of the phrase "equitable relief" in § 502(a)(3). The specific question presented in *Mertens* was whether a lawsuit filed by ERISA plan beneficiaries seeking monetary relief against a third party who participated knowingly in the plan fiduciaries' breach of their fiduciary duties was one for "appropriate equitable relief" under the statute.

In concluding that the beneficiaries' claim did not constitute "equitable relief," the Court announced the (now familiar) rule that § 502(a)(3) only authorizes civil actions seeking "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original).

In the decade or so following *Mertens*, the courts of appeal squarely divided over two extremely important questions regarding what, if any, *monetary relief* could qualify as "typically available in equity" for purposes of § 502(a)(3). One of these two circuit splits was over the

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[32] 29 U.S.C. 1132(a)(3).

§ 502(a)(3) Question itself. As the United States noted in a 2004 filing with the Fifth Circuit:

> This court [the Fifth Circuit] has not considered the question whether section 502(a)(3) of ERISA authorizes participants to recover direct monetary losses caused by a fiduciary breach. Both the Second and Seventh Circuits have held that participants can obtain such relief. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 133 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000). The Fourth, Sixth, Eighth and Ninth Circuits have held the opposite. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (CA6 2001), *cert denied*, 535 U.S. 928 (2002); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (CA8 1999); *FMC Med. Plan v. Owens*, 122 F.3d 1258 (CA9 1997).[33]

The second circuit split involved a separate recurring question regarding the availability of monetary relief under § 502(a)(3): the courts of appeal divided over whether—and under what circumstances—lawsuits filed by plan fiduciaries seeking monetary reimbursement of advanced medical expenses from plan participants or beneficiaries pursuant to a contractual reimbursement provision were permissible under § 502(a)(3).[34] Recognizing the importance of that issue, this

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[33] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellants and Requesting Reversal of the District Court's Decision in *Milofsky et al. v. American Airlines, Inc, et al.*, (No. 03-11087) (February 27, 2004) at http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.htm (last visited on November 1, 2006).

[34] When a participant in or beneficiary of an ERISA welfare plan is injured (*e.g.*, in an automobile accident), she will receive money from the plan (or its insurer) to pay for her medical expenses. The injured participant or beneficiary may also bring a personal injury lawsuit for

Court granted certiorari in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ("*Great-West*"). In *Great West*, this Court clarified the *Mertens* test and made clear that, in assessing whether a claim is remediable under § 502(a)(3), a federal court must look not only at the category of relief sought but also at the historical context in which such a remedy would have been available in a pre-merger court of equity. *Great-West*, 534 U.S. at 216. Significantly, for purposes of this petition, *Great-West* did *not* resolve the § 502(a)(3) Question.

As explained herein, further review of the § 502(a)(3) Question is warranted for two reasons. First, the ability of participants in (and beneficiaries of) ERISA plans to bring suit under § 502(a)(3) to recover monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach is a "recurring issue" of "extraordinary importance." Second, the § 502(a)(3) Question was recently left open by this Court and continues to divide and confuse the courts of appeal. This Court's guidance is needed.

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money damages (including the recovery of medical expenses) against any third party who might have been responsible for her injuries. For this reason, plan fiduciaries commonly require that every plan participant contractually agree to reimburse medical expenses out of any personal injury settlement or judgment that she might recover. Whether, and under what circumstances, such reimbursement seeks relief that was "typically available in equity" and, thus, available under § 502(a)(3) was the precise question that divided the courts of appeal.

A. As the United States acknowledges, the § 502(a)(3) Question "is of extraordinary importance."

As the United States has repeatedly acknowledged, the § 502(a)(3) Question is constantly recurring and of exceptional importance. For example, in *Goeres v. Charles Schwab & Co., Inc., et al.*, the United States recently noted that:

> [the] case presents a significant and recurring remedial issue: whether section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits beneficiaries to recover monetary losses from fiduciaries who have breached their duties and caused harm to the beneficiaries. The Secretary has consistently taken the position, in this Court and others, that "appropriate equitable relief" in section 502(a)(3) includes recovery of monetary losses from fiduciaries because historically such relief was typically and exclusively available in equity.[35]

The recurring nature of the question cannot be overstated. The United States has chosen to address the question in *amicus curiae* briefs before this Court as well as throughout the courts of appeal.[36] The importance of the question is similarly manifest:

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[35] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Requesting Reversal in *Goeres v. Charles Schwab & Co., Inc., et al (05-15282) located at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf (last visited on November 5, 2006).

[36] In the Second Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in *Coan v. Kaufman* (04-5173) (March 25, 2005) *at* http://www.dol.gov/sol/media/briefs/Coan(A)-3-25-2005.pdf (last visited November 5, 2006) ("U.S. Coan Br.") and Brief of United States Sec'y of Labor as *Amicus Curiae* Supporting Appellant's Petition for Panel and En

> the equitable nature of monetary relief to remedy fiduciary breaches – is of extraordinary importance, both in the Seventh Amendment context [] and in its impact on the ability of ERISA participants and beneficiaries who have been harmed by fiduciary breaches to bring claims for make-whole monetary relief.[37]

The interpretation of § 502(a)(3) now adopted by the majority of circuits—including the Fourth Circuit in this case—will permit "[f]iduciaries [to] violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused."[38] *See e.g., Farr v. U.S. West Communications, Inc.,* 151 F.3d 908 (CA9 1998) (acknowledging that plan fiduciaries violated their duties under ERISA by knowingly withholding information regarding material tax consequences but finding that the participants had no remedy because the amount of additional taxes incurred were legal damages).

Banc Rehearing in *Pereira v. Farace* (03-5035, 5055) at http://www.dol.gov/sol/media/briefs/pereirabrief.pdf (last visited November 5, 2006) ("U.S. Pereira Br."). In the Fourth Circuit, *see* U.S. Br., *supra n.18.* In the Fifth Circuit, *see U.S. Milofsky Br., supra n.33.* In the Ninth Circuit, *see U.S. Goeres Br., supra n.35;* In the Tenth Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Reversal of the District Court in *Callery v. The United States Life Insurance Company in the City of New York, J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet, Inc.* (03-4097) (August 20, 2003) *at* *http://www.dol.gov/sol/media/briefs/callery-08-20-2003.pdf* (last visited on November 5, 2006) ("U.S. Callery Br.")

[37] U.S. Pereira Br., *supra*, n.36.

[38] U.S. Callery Br., *supra* n.36.

B. As the United States acknowledges, the § 502(a)(3) Question was left open by this Court in *Aetna* and has divided the circuits.

The significance of the problem above—and the best hope for a solution—were recently articulated by members of this very Court.

> I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *DiFelice* v. *AETNA U.S. Healthcare*, 346 F.3d 442, 453 (CA3 2003) (Becker, J., concurring).
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> Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided." *Id.*, at 456 (internal quotation marks omitted).
>
> A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.
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> * * *
>
> The Government notes a potential amelioration. Recognizing that "this Court has construed Section 502(a)(3) not to authorize an award of money damages against a *non-fiduciary*," the Government suggests that the Act, as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in

> equity at the time of the divided bench." Brief for United States as *Amicus Curiae* 27—28, n. 13 (emphases added); cf. *ante*, at 19 ("entity with discretionary authority over benefits determinations" is a "plan fiduciary"); Tr. of Oral Arg. 13 ("Aetna is [a fiduciary]–and CIGNA is for purposes of claims processing."). As the Court points out, respondents here declined the opportunity to amend their complaints to state claims for relief under § 502(a); the District Court, therefore, properly dismissed their suits with prejudice. See *ante*, at 20, n. 7. But the Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue.[39]

Following *Aetna*, the United States has continued to vigorously assert its interpretation throughout the courts of appeal. Recently before the Ninth Circuit, the government observed that the pre-*Great-West* circuit split on the § 502(a)(3) Question still continues to linger:

> In accordance with this [proper historical analysis required by *Great-West*], the Seventh Circuit has awarded monetary relief against fiduciaries as "appropriate equitable relief" in ERISA cases. *See Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). However, a number of other courts have held to the contrary. *See, e.g., Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481-82 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943- 44 (8th Cir. 1999); cf.

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[39] *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (Ginsburg, J, concurring).

> *Pereira v. Farace*, No. 03-5035(L), 2005 WL 1532318, at *7-9 (2d Cir. June 30, 2005) (in a state law breach of trust case, court holds that monetary relief from a breaching fiduciary is legal relief entitling defendants to jury trial.)[40]

The Seventh Circuit recently reaffirmed its position in *McDonald v. Household International, Inc.*, 425 F.3d 424, 430 (CA7 2005) ("It will be up to the McDonalds on remand to decide whether they wish to proceed with their case or to abandon it. In that connection, they may wish to take note of Justice Ginsburg's comment in her concurring opinion in *Davila*, in which she drew attention to the Government's suggestion that ERISA "as currently written and interpreted, may allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench."

That said, the majority of circuits have rejected the position taken by petitioner and the United States.

> [W]e now note the growing majority of appellate decisions opinion that the Supreme Court's interpretation of 502(a)(3) as it applies to non-fiduciaries would not differ with respect to fiduciaries. However, this court refused to dismiss the case at such an early stage because of the ongoing judicial debate over interpretation and intent of 502(a)(3).[41]

Rather than perform their own historical analysis, however, these "majority" courts have merely taken and misapplied

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[40] U.S. Goeres Br. at 16, n.7.

[41] *McDonald v. HSBC Finance Corporation*, 2006 WL 2669950 (S.D. Ind. 2006).

dicta from *Great West* in reaching their conclusion. For example, in explicitly rejecting the United States' interpretation of § 502(a)(3), the Second Circuit stated that:

> The Trustee contends that the holding of *Great-West* is inapplicable here because *Great-West* involved only non-fiduciary defendants. * * * [W]e are compelled to read *Great-West* as broadly as it is written. Nor can we ignore the Supreme Court's inclusion of footnote 2, highlighting a single exception to its rule that a defendant must possess the funds at issue for the remedy of equitable restitution to lie."[42]

The words of Judge Newman, who wrote a separate concurrence, are particularly instructive:

> Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties and the rarity of decisions requiring a jury for such claims, I am persuaded that the Supreme Court's dictum in *Great-West*, sends a signal that should not be ignored. * * * The statement is dictum with respect to an action against a fiduciary because the defendant in *Great-West* was not a fiduciary. But the Court appears to be little concerned with the nature of the defendant and critically concerned with whether the defendant is being compelled to disgorge specific, traceable funds in his possession, in which case the action is in equity, or to pay money out of his pocket, i.e., damages, to a claimant.[43]

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[42] *Pereira,* 413 F.3d at 340.

[43] *Id. at* 344 and 346.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1756

JAMES LARUE, PLAINTIFF-APPELLANT

v.

DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED;
DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED,
EMPLOYEES' SAVINGS PLAN, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.
(CA-04-1747-2)

Argued: May 22, 2006
Decided: June 19, 2006

Before: WILKINSON and TRAXLER, Circuit Judges, and
RICHARD L. WILLIAMS, Senior United States District Judge
for the Eastern District of Virginia, sitting by designation

OPINION

WILKINSON, Circuit Judge:

The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.

We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while § 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here. Plaintiff has alleged no unjust enrichment, unlawful possession, or self-dealing on the part of defendants, and the remedy he seeks falls outside the scope of the "equitable relief" that § 1132(a)(3) authorizes.

I.

DeWolff, Boberg & Associates, Inc. is a nationwide management consulting firm organized under the laws of South Carolina. It administers, and is thus a fiduciary of, an ERISA-regulated 401(k) retirement savings plan in which its current and former employees participate. The plan permits participants who so desire to manage their own accounts by selecting from a menu of various investment options.

Plaintiff James LaRue has participated in this 401(k) plan since 1993. He alleges that in 2001 and 2002, he directed

DeWolff to make certain changes to the investments in his plan account, but that these directions were never carried out. In 2004, he brought suit against DeWolff and the plan, claiming that this omission amounted to a breach of fiduciary duty.* According to the complaint, his "interest in the plan ha[d] been depleted approximately $150,000.00" as a result of defendants' failure to follow his instructions. To recover for this loss, the complaint sought "appropriate 'make whole' or other equitable relief pursuant to [29 U.S.C. § 1132(a)(3)]."

Defendants subsequently filed a Rule 12(c) motion for judgment on the pleadings, contending that plaintiff's requested remedy was not available under § 1132(a)(3). The district court agreed, and thereafter dismissed the case with prejudice.

Plaintiff appeals. We review de novo a district court's decision to grant judgment on the pleadings. *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002).

II.

In enacting ERISA, Congress sought to uniformly regulate the wide universe of employee benefit plans. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). A salient feature of this effort was the careful delineation of civil remedies available to litigants seeking to enforce their rights under such plans. *See id.* at 208-09. Congress broadly preempted previously available state-law causes of action, *see* 29 U.S.C. § 1144(a), and set forth in a single section of ERISA the exclusive list of civil actions available to parties

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* Accepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties.

aggrieved by a statutory violation, *see id.* § 1132(a); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990).

Section 1132(a) stops short of providing ERISA complainants with a full arsenal of relief. ERISA is "an enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Its civil enforcement provision in particular attempts to settle "a tension between the primary ERISA goal of benefiting employees and the subsidiary goal of containing pension costs." *Id.* at 262-63 (internal quotation marks and alterations omitted). Congress has consequently made various "policy choices" resulting in "the inclusion of certain remedies and the exclusion of others." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

Interpretation of § 1132(a) is therefore no easy task. As the Supreme Court's ERISA decisions have repeatedly cautioned, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) (internal quotation marks omitted); *Mertens*, 508 U.S. at 261 (same). Section 1132(a) represents an "interlocking, interrelated, and interdependent remedial scheme" that "provide[s] strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

With these constraints in mind, we consider whether the statute's text provides the particular relief at issue here.

III.

Plaintiff first suggests that remuneration of his plan account finds express authorization in the text of 29 U.S.C. § 1132(a)(2). That subsection allows for a civil action "by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109, in turn, provides that

> [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .

29 U.S.C. § 1109(a).

Plaintiff's argument regarding the applicability of § 1132(a)(2) is made for the first time on appeal. Even if the argument were not therefore waived, *see, e.g.*, *Jones v. Liberty Mut. Ins. Co.* (*In re Wallace & Gale Co.*), 385 F.3d 820, 835 (4th Cir. 2004), he could not succeed on the merits. Recovery under this subsection must "inure[] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan. *Russell*, 473 U.S. at 140 (emphasis added); *see also Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 714 (4th Cir. 1996). "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect

the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142 (footnote omitted).

It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him.

We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as § 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account,* which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief.

This case is much different from a § 1132(a)(2) action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants. *See Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999); *see also In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 233, 235 (3d Cir. 2005); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995). In such a case, the "remedy will undoubtedly benefit [the plaintiff] and other participants in the [p]lan," but "it does not *solely* benefit the individual participants." *Smith*, 184 F.3d at 363 (emphasis added); *see also Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 605 (8th Cir. 1995) (permitting recovery for losses to the plan but not losses to the individual plaintiff beneficiaries for defendants' alleged breach of fiduciary duty). Here, by contrast, plaintiff seeks to particularize the recovery to

himself. Section 1132(a)(2) is not a proper avenue for him to obtain such relief.

IV.

We thus turn to plaintiff's second theory of relief, which relies on a different ERISA remedial provision, 29 U.S.C. § 1132(a)(3). That section authorizes a civil action

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Plaintiff contends that the "make whole" relief he seeks constitutes one of the forms of "other appropriate equitable relief" that the provision authorizes.

A.

In construing the scope of § 1132(a)(3), the Supreme Court has stressed that the term "equitable" is one of limitation. In *Mertens v. Hewitt Associates*, the Court held that the phrase "equitable relief" refers only to "those categories of relief that were *typically* available in equity" in the days of the divided bench. 508 U.S. at 256; *see also Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873 (2006). The Court reasoned that other sections of ERISA expressly refer to "equitable or remedial relief," 29 U.S.C. § 1109(a), and "legal or equitable relief," *e.g.*, *id.* § 1132(g)(2)(E), thereby demonstrating that "equitable relief" connotes only a subset of the full palliative spectrum. *See Mertens*, 508 U.S. at 258. The Court refused to "read the statute to render the modifier superfluous," *id.*, a construction

that would undermine Congress's exclusive remedial scheme by opening a back door through which uninvited remedies might enter, *id.* at 257.

The particular definition of "equitable" that the Court has adopted finds support in a well-known principle of statutory construction. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Section 1132(a)(3) expressly mentions the right to "enjoin" certain acts or practices "*or* . . . to obtain *other* appropriate equitable relief" (emphasis added). The understanding of what "equitable" means in this context is necessarily informed by its association with injunctive relief, the quintessential exemplar of a remedy that equity alone would typically provide.

Determining the applicability of § 1132(a)(3) therefore requires a court to examine whether the form of relief a plaintiff seeks is, like an injunction, historically one that a court of equity rather than a court of law would have granted. *See Sereboff*, 126 S. Ct. at 1874. The Supreme Court has, in addition to injunctions, listed mandamus and restitution as examples of traditional equitable remedies. *See Mertens*, 508 U.S. at 256. Subsequent decisions of both the Supreme Court and this court have been wary of expanding the list beyond these archetypes and their closely related kin. *See, e.g. Varity Corp. v. Howe*, 516 U.S. 489, 495, 515 (1996) (reinstatement to a plan); *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440, 449 (4th Cir. 2004) (rescission); *Denny's, Inc. v. Cake*, 364 F.3d 521, 526 n.6 (4th Cir. 2004) (declaratory relief incident to an injunction).

B.

Mertens and its progeny compel the conclusion that the remedy plaintiff desires falls outside the scope of § 1132(a)(3). As in *Mertens*, although he "often dance[s] around the word," what plaintiff "in fact seek[s] is nothing other than compensatory *damages* — monetary relief for all losses . . . sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255. "Money damages are, of course, the classic form of *legal* relief," *id.*, and have therefore remained conspicuously absent from the list of traditional equitable remedies available under § 1132(a)(3), *id.* at 256.

While that list does include "restitution," *id.*, this form of recovery is not so broad as to include the compensatory relief that plaintiff seeks. As the Supreme Court explained in *Great-West Life & Annuity Insurance Co. v. Knudson*, "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212. In particular, "for restitution to lie in equity," as opposed to at law, "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214; *see also id.* at 214 n.2 (noting a single "limited exception" applicable to "an accounting of profits").

The Supreme Court's most recent § 1132(a)(3) decisions demonstrate how the absence of unjust possession is fatal to an equitable restitution claim. In *Knudson*, the Court denied a restitutionary remedy under § 1132(a)(3) where "'the funds to which petitioners claimed an entitlement' were not in Knudson's possession, but had instead been placed in a 'Special Needs Trust' under California law." *Sereboff*, 126 S. Ct. at 1874 (quoting *Knudson*, 534 U.S. at 207, 214) (internal alterations omitted). More recently in *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Court allowed a

claim for equitable restitution to proceed where "Mid Atlantic sought specifically identifiable funds that were within the possession and control of the Sereboffs." *Id* (internal quotation marks omitted). The Court in *Sereboff* reaffirmed the possession requirement it had announced in *Knudson*, but found that the "impediment to characterizing the relief in *Knudson* as equitable [was] not present" in the Sereboffs' case. *Id.*

The impediment is, however, present in this case, and it precludes plaintiff from recovering under an equitable restitution theory. Plaintiff does not allege that funds owed to him are in defendants' possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss — a measure that is traditionally legal, not equitable. *See, e.g., Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir. 1999); *see also Sereboff*, 126 S. Ct. at 1874 (claim may be characterized as legal if plaintiff does not "seek to recover a particular fund from the defendant"). Thus, at core, he seeks "to obtain a judgment imposing a merely personal liability upon the defendant[s] to pay a sum of money." *Knudson*, 534 U.S. at 213 (internal quotation marks omitted). As *Knudson* explained, historically "[s]uch claims were viewed essentially as actions at law," and they are therefore unavailable under § 1132(a)(3). *Id.*

C.

Plaintiff attempts to avoid this conclusion by arguing that his requested "make whole" relief represents something entirely different from the types of remedies that we or the Supreme Court have heretofore considered in the context of § 1132(a)(3). In particular, he emphasizes that this case involves a situation where a participant or beneficiary is suing a fiduciary for a breach of fiduciary duty. In his view,

the scope of "equitable" remedies available in such a case is broader than when a fiduciary sues a beneficiary (as was the case in *Knudson* and *Sereboff*) or when a beneficiary sues a non-fiduciary (as was the case in *Mertens*). Unlike either of those scenarios, the argument goes, this case can be analogized to a common law breach-of-trust action by a beneficiary seeking to recover lost trust profits, a remedy that trust treatises have labeled "equitable." *See Restatement (Second) of Trusts* §§ 197, 205(c) (1959); *see also* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 861 (rev. 2d ed. 1995).

The governing precedent, however, does not point as plaintiff suggests. In fact, *Mertens* squarely "rejected the claim that the special equity-court powers applicable to trusts define the reach of [§ 1132(a)(3)]." *Knudson*, 534 U.S. at 219; *see Mertens*, 508 U.S. at 256-57. While the generally exclusive jurisdiction of equity courts over breach-of-trust suits renders all remedies in such cases "equitable" in the sense that a court of equity has power to grant them, "equitable" in the context of § 1132(a)(3) has a narrower meaning. *Mertens*, 508 U.S. at 256. Under *Mertens*, "the relevant question is . . . whether a given type of relief was available in equity courts *as a general rule*," *Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) (emphasis added), rather than merely in the context of "*the particular case at issue*," *Mertens*, 508 U.S. at 256. "Equitable relief" therefore does not encompass the "many situations — not limited to those involving enforcement of a trust — in which an equity court could," by virtue of its jurisdiction over the claim at issue, "grant legal remedies which would otherwise be beyond the scope of its authority." *Id.* (internal quotation marks omitted).

That plaintiff can analogize this suit to a common law breach of trust action therefore proves of no avail in characterizing the relief he seeks as equitable. Plaintiff

admits that he lacks support for the notion that "make whole" relief was available in equity outside the context of trusts. It is therefore impossible for us to conclude that such relief "was available in equity courts as a general rule," *Rego*, 319 F.3d at 145.

The Sixth Circuit has reached a similar conclusion in a case presenting facts nearly identical to those before us here. In *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001), a beneficiary of an employee 401(k) plan sued a plan fiduciary for failing to comply with written directions to roll over his assets into a specific set of mutual funds. *Id.* at 479-80. The plaintiff asserted an entitlement to the difference between the "amount he would have earned" had the fiduciary followed his instructions and "the amount he in fact earned" as a result of the fiduciary's alleged breach of duty. *Id.* at 480. The court concluded that his requested remedy was unavailable under § 1132(a)(3). *Id.* at 481-83. It found that the plaintiff could not style his relief as "restitution" when he was measuring recovery by his own losses rather than the defendant's gains, *id.* at 482-83, and it rejected a strict congruence between § 1132(a)(3) and the common law of trusts, *id.* at 482 (citing *Mertens*, 508 U.S. at 256). It therefore dismissed the suit because "ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries." *Id.* at 482.

As *Helfrich* shows, the fact that a plaintiff happens to be a participant or beneficiary suing a fiduciary is entirely beside the point in the § 1132(a)(3) inquiry; the status of the parties does not determine the nature of the relief. Many other circuits, both before and after *Knudson*, have likewise rejected the notion that whether a particular form of relief is "equitable" depends on the identity of the parties. *See Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005); *Callery v. U.S. Life Ins. Co. in the City of*

N.Y., 392 F.3d 401, 409 (10th Cir. 2004); *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376. 378 (9th Cir. 1996); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994); *see also Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005) (noting that compensatory damages are unavailable under § 1132(a)(3) in suit for breach of fiduciary duty); *D'Amico v. CBS Corp.*, 297 F.3d 287, 289, 292 n.5 (3d Cir. 2002) (same). The teachings of *Mertens* and *Knudson* obligate us to agree, and plaintiff's contrary argument therefore fails to cast doubt upon our conclusion that the compensatory relief he seeks is legal, not equitable.

V.

Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of "ensuring fair and prompt enforcement of rights under a plan" on the one hand and "encourag[ing] . . . the creation of such plans" on the other. *Aetna Health*, 542 U.S. at 215 (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this — where there was no unjust enrichment, unlawful possession, or self-dealing — would seriously deter plan formation and the service of qualified individuals and institutions as fiduciaries. *Compare, e.g.*, *Mertens*, 508 U.S. 262-63 (discussing negative effects of expansive ERISA liability).

Congress's decision to omit such liability hardly leaves a plan participant or beneficiary in plaintiff's position without recourse. He could, for example, seek an injunction compelling compliance with his investment instructions, *see* 29 U.S.C. § 1132(a)(3), or, under appropriate circumstances, bring suit on the plan's behalf to remove the fiduciary, *see* 29 U.S.C. § 1109(a). In Congress's view, such alternative

remedies are sufficient to keep fiduciaries from breaches of fiduciary duty that result in no benefit whatsoever to themselves. We possess no authority "to adjust the balance . . . that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263. Accordingly, we affirm the judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:04-1747-18

JAMES LARUE, PLAINTIFF

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED, EMPLOYEES' SAVINGS PLAN, DEFENDANTS

ORDER and OPINION

I. BACKGROUND

This matter is before the court on defendants' motion for judgment on the pleadings. Plaintiff James LaRue filed this action on June 2, 2004, alleging breach of fiduciary duty against defendants DeWolff, Boberg & Associates, Inc. ("DeWolff") and DeWolff, Boberg & Associates Employees' Savings Plan ("Plan"). Plaintiff is a participant in an employee savings plan administered by DeWolff. Plan participants are able to direct plan administrators on how they want their money invested. Plaintiff alleges that in 2001 and 2002 defendants failed to invest his money as he directed, and as a result his interest in the plan was depleted by approximately $150,000. Plaintiff seeks equitable relief for that loss under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(3). Plaintiff also alleges that DeWolff

failed to provide certain information regarding the plan within the time frame required by ERISA, 29 U.S.C. § 1132(c). On February 2, 2005, defendants filed a motion for judgment on the pleadings as to plaintiff's claim for equitable relief under § 1132. Defendants' motion does not address plaintiff's claim for failure to provide information under § 1132(c), or his request for attorneys' fees and costs under § 1132(g).

II. STANDARD OF REVIEW

"When considering a motion for judgment on the pleadings, the same standard as that for a motion to dismiss applies." BET Plant Services, Inc. v. W.D. Robinson Elec. Co., Inc., 941 F. Supp. 54, 55 (D.S.C. 1996). A motion to dismiss should be granted only when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). When considering dismissal, a plaintiff's well pleaded allegations are taken as true, and the complaint, including all reasonable inferences, is construed liberally in the plaintiff's favor. Republican Party of North Carolina v. Martin, 980 F.3d 943, 952 (4th Cir. 1992).

III. ANALYSIS

Defendants contend that plaintiff's remedy is essentially a demand for money damages, which the relevant ERISA provision prohibits. Plaintiff does not make a specific monetary demand for $150,000. Rather, plaintiff requests the court to award him "make-whole or other equitable relief" as provided in § 1132(a)(3), which allows a participant or beneficiary to bring a civil action "to obtain other appropriate equitable relief" to redress violations of a plan's terms or provisions. Both parties agree that pure money damages may not be awarded under § 1132. Instead,

plaintiff posits his claim as an request for equitable relief. The "equitable relief" described in § 1132 refers to the specific types of relief typically available in equity (i.e, restitution, injunction, mandamus) and not legal remedies available to a court of equity. See Mertens v. Hewitt Assoc., 508 U.S. 248, 257 (1993). Plaintiff implicitly suggests that the court could award $150,000 under a restitution theory. As defendants note, courts have narrowed the availability of restitution under § 1132. Restitution is "appropriate equitable relief" under § 1132

> where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . [F]or restitution to lie in equity, the action generally must eek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-14 (2002). Applying the Supreme Court's language, restitution does not fit the facts of this case. The $150,000 never belonged to plaintiff because it represents potential value, not actual earnings; as such, there is nothing to restore. Nor is the amount in defendants' possession. Awarding plaintiff $150,000 as restitution would impose personal liability on defendants.

Defendants note two recent, analogous cases in which the court dismissed a plaintiff's ERISA claim for restitution. In Rego v. Westvaco Corp., 319 F.3d 140 (4th Cir. 2003), plaintiff sought equitable relief against his employee benefits plan after the plan delayed withdrawing his share. Because of the delay plaintiff could not take advantage of a high stock price, and as a result, his share was worth about $80,000 less.

The Fourth Circuit held that the plaintiff's claim could not be considered as equitable restitution because the defendant did not possess any funds that could be "clearly identified as belonging in good conscience to the plaintiff."[1] Rego, 319 F.3d at 145 (citing Great-West, 534 U.S. at 213). Similarly, the disputed sum *sub judice* is neither in the possession of defendant nor belonging to plaintiff.

In Helfrich v. PNC Bank, 264 F.3d 477 (6th Cir. 2001), plaintiff sought equitable relief after the administrator of his 401(k) profit sharing plan failed to follow directions for rolling-over plaintiff's assets into a mutual fund. As a result, plaintiff incurred a loss. Using § 1132, plaintiff sought the difference between the amount he would have had if the administrator had followed directions, and the amount he actually received. The Sixth Circuit rejected this approach, labeling it money damages and not restitution. If the administrator had invested plaintiff's money for its own benefit in an unauthorized, but better performing account, plaintiff could claim that money (and its proceeds) under a theory of restitution. However, the court noted that the plan possessed none of plaintiff's funds or proceeds of those funds; "there is nothing to restore . . . and therefore no basis for restitutionary relief." Helfrich, 267 F.3d at 481. Rather than measure his request in terms of the plan's gain, plaintiff measured it in terms of his losses - the "hallmark of money

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[1] Rego also rejected plaintiff's claim that return of $80,000 would amount to equitable "make-whole" relief. After withdrawing his shares, plaintiff was able to sell them at a high price, ultimately mitigating his damages. Defendant's delay caused plaintiff to lose only $24,500, yet he requested over $80,000. Considering that discrepancy, the court concluded that plaintiff was not really trying to "make himself whole," and rejected his "make-whole" argument. Plaintiff interprets the court's rejection as a repudiation of Rego's claim, but affirmation of the "makewhole" equitable remedy. Regardless, the restitution argument fails on the Great-West principles.

damages." Id. at 482-83. As in Helfrich, the present plaintiff has suffered a loss but defendants have received no gain.

Plaintiff relies on Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994) and Shade v. Panhandle Motor Service Corp., 91 F.3d 133 (4th Cir. 1996) (unpublished) to suggest equity can command money damages for his loss. Neither case is controlling. In Howe, the court approved payments of past-due benefits previously deprived to a group of plan beneficiaries who were fraudulently induced to leave a solvent plan and enter a failing one. The court issued an injunction restoring the plaintiffs to the plan and awarding the benefits they would have received had they remained in the plan. Plaintiffs were awarded money, improperly held by defendants, to which they had a rightful claim. Such is not the scenario in the present case. Howe also carries less weight because it was decided prior to the seminal Supreme Court and Fourth Circuit cases on § 1132's scope (Great-West, 2002; Rego, 2003).

In Shade, the Fourth Circuit approved restitution to a health plan beneficiary who was forced to incur over $100,000 in medical expenses due to the plan's mistake. The court restored plaintiff to the position he would have been in but for the fiduciary's mistake (by putting him back in the plan) and reimbursed him for money he paid out of pocket. Plaintiff's medical expenses represented a gain to defendant; i.e, the benefits were improperly held by defendants ($100,000 in their coffers), but rightfully belonged to plaintiff. Like Howe, Shade s authority is diminished because it was decided prior to both Great-West and Rego.

Finally, plaintiff suggests the court can use the equitable power of reinstatement to order defendants to "process the transaction that plaintiff requested to be processed several years ago." (Pl.'s Rep. Mem. at 7.) Plaintiff is still a member of the plan, so he retains the power to instruct

defendants on his current investments. Processing the transaction as plaintiff originally instructed is not possible without restoring funds to plaintiff's account. Further, plaintiff's authority in support of the court's power to reinstate under § 1132 is not dispositive. In Griggs v. E.I. Dupont De Nemous & Co., 237 F.3d 371 (4th Cir. 2001), plaintiff took early retirement in reliance on his plan's advice regarding the tax implications of electing a lump-sum payment of benefits. When that advice turned out to be faulty, plaintiff incurred a loss and sought an equitable remedy under § 1132. The court remanded the case for further factual development of whether reinstatement to his former job was proper. The lower court was also to determine whether restoration to Griggs' pre-election position was possible. The Fourth Circuit did not express an opinion on whether either remedy was permissible. Regardless, the subsequent holdings in Great-West and Rego supplant Griggs.[2]

Since the hearing, the Fourth Circuit has again addressed the contours of "appropriate" relief under § 1132(a)(3). In Mid-Atlantic Medical Services, LLC v. Sereboff, 407 F.3d 212, 218 (4th Cir. 2005), the court considered a fiduciary's claim for relief against a beneficiary who refused to honor a subrogation provision. The court characterized the fiduciary's claim as permissible equitable restitution because the funds were specifically identifiable, belonged in good conscience to the fiduciary, and were within the possession and control of the beneficiary. Mid-Atlantic, 407 F.3d at 219 (citing Great-West, 534 U.S. at 213). Applying these three

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[2] At the hearing plaintiff cited Schaffer v. Westinghouse Savannah River Co., No. 04-1347, 2005 WL 567812 (4th Cir. March 11, 2005) in support of its position. Schaffer remanded an ERISA case with instructions to the district court to determine whether a pension recalculation was appropriate § 1132(a)(3) relief. The court did not express an opinion on the possible remedy. Schaffer is not as significant to the issue at bar as the guidelines set forth in Great-West, Rego, and Sereboff.

factors, the court must conclude that restitution is not a permissible § 1132(a)(3) remedy in the case at bar.

IV. CONCLUSION

Plaintiff "does not wish for the court to award him any money, but . . . simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty." (Pl.'s Rep. Mem. at 7.) Yet to "properly reflect" that interest, the court would have to transfer money from defendants to plaintiff. Under Supreme Court and Fourth Circuit precedent, restitution is not available since defendants do not possess disputed funds rightly belonging to plaintiff. The disputed sum is a potential gain that was never held by either party. The court cannot hypothesize a means of recovery for plaintiff which is consistent with the guidelines of Great-West, Rego and Sereboff. Therefore, plaintiff is not entitled to any § 1132(a)(3) relief under these set of facts.

For the reasons stated above, it is therefore **ORDERED** that defendants' motion for judgment on the pleadings as to plaintiff's cause of action for "other equitable relief" under § 1132(a)(3) is **GRANTED**.[3]

/s/ DAVID C. NORTON
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

June 23, 2005
Charleston, South Carolina

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[3] This order does not address plaintiff's claim for breach of fiduciary duty or his requests for a statutory penalty under 29 U.S.C. § 1132(c) or for attorney's fees and costs under 29 U.S.C. § 1132(g).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1756

JAMES LARUE, PLAINTIFF-APPELLANT

v.

DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED;
DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED,
EMPLOYEES' SAVINGS PLAN, DEFENDANTS-APPELLEES

SECRETARY OF LABOR, AMICUS SUPPORTING APPELLANT

Filed: August 8, 2006

ORDER

Appellant has filed a petition for rehearing and rehearing en banc in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570 (4th Cir. 2006), and the Secretary of Labor has filed a motion out-of-time for leave to file an amicus brief on appellant's behalf. The court grants the Secretary's motion for leave to file out-of-time, but the petition for rehearing and the petition for rehearing en banc are denied.

With respect to the Secretary's views, the court notes that they are always welcome on any matter in which the Secretary has an interest. The timely submission of those views, however, will assist the court in giving them the

attention they deserve. Initial submission of these views in a petition for rehearing — and an untimely one at that — affords neither the litigants or this court a proper chance to review the case in single, rather than piece-meal, fashion. Thus, the Secretary's belated entry into *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), was a discourtesy both to the parties in that case and to the court.

The same holds true of the even more untimely filing here. Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief "no later than 7 days after the *principal* brief of the party being supported is filed." Fed. R. App. P. 29(e) (emphasis added). The term "principal brief" would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, *see id.* advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage. While it may suit the agency's convenience to troll for panel results to which it takes exception, such a practice is not consistent with the orderly and conscientious disposition of claims in an appellate court. *See* Sup. Ct. R. 44(5) ("The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing."); D.C. Cir. R. 35(f) ("No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.").

Having served notice that untimely submissions will henceforth be disfavored, the court will out of respect for the Secretary address its views in the instant case. The Department of Labor concedes that *LaRue* must be "read

broadly" to give rise to the possible difficulties it envisions. Br. at 1. To begin with, the problems supposed by the Department are at best speculation: the Secretary says only that they "could" possibly arise. *Id.* at 7. The Secretary, moreover, offers no explanation for and quotes no language from the opinion as to why the case must be "read broadly." To the contrary, *LaRue* involves a single plaintiff who sought to recover for an individual loss; indeed, LaRue did not even allege a "loss to the plan," but only to his "interest in the plan." J.A. 7-9. It is, therefore, the Secretary's position, rather than the panel's, that is the broad one — for it stretches the ERISA statute unacceptably. Neither the text of Section 502(a)(2) nor Supreme Court precedent contemplate a remedy for individual, rather than plan, losses. To adopt the Secretary's view, however, would necessarily transform every purely individual claim for breach of fiduciary duty into a "plan loss." Such an expansive view of fiduciary liability would lead to its own parade of horribles, a parade that Congress refused to countenance. *See Pilot Love Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

The Secretary's view — that a purely individual claim that bears any legal relationship to a plan inures to the benefit of that plan — is contrary to the plain text of the statute. Section 502(a)(2) incorporates Section 409 which provides that a fiduciary who breaches a plan duty "shall be personally liable to make good to such plan *any losses to the plan* resulting from each such breach, and to restore to *such plan* any profits of such fiduciary which have been made *through use of assets of the plan* by the fiduciary." 29 U.S.C. § 1109(a) (2000) (emphasis added). As the Supreme Court has explained: "[T]he entire text of § 409 persuades us that Congress did not intend that section to authorize any relief *except for the plan itself.*" *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (emphasis added). If Congress meant to authorize individual damages claims under § 502(a)(2), it had only to say so. Instead, the text

emphasizes the precise nature of the remedy provided by Congress: a remedy restricted to plan losses. Furthermore, ERISA is a "comprehensive and reticulated statute," *id.* at 146, it implements Congress' various "policy choices," *Dedeaux*, 481 U.S. at 54, and courts should therefore be "especially reluctant to tamper with the enforcement scheme embodied in the statute . . . by extending remedies not specifically authorized by its text." *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation and alteration omitted).

The Secretary's view is thus inconsistent with the Supreme Court's decision in *Russell*. The *Russell* Court held that § 502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole, not on their own behalf. 473 U.S. at 140, 144; *see Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) ("[§ 502(a)(2)] does not provide a remedy for individual beneficiaries."). As the Supreme Court explained, ERISA's fiduciary duty provisions are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying individual wrongs. *Russell*, 472 U.S. at 141. As a result, a § 502(a)(2) claim must "be brought in a representative capacity on behalf of the plan as a whole." *Id.* at 141 n.9. The Department of Labor, however, fails to explain how its overly broad reading of "loss to the plan" — to include entirely individual claims — can possibly be squared with *Russell*'s representative capacity requirement. Here, LaRue seeks to recover money damages to which he believes he is individually entitled — such an action is in no sense "representative."

The Secretary's atextual reading of Section 502(a)(2) would also strip *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life and Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), of any real significance. In those cases, the Supreme Court refused to read Section 502(a)(3)'s language "appropriate equitable relief" to

authorize money damages, because such a construction would undermine Congress' carefully crafted remedial scheme. Indeed, ERISA provides not one, but two, bases for individual beneficiaries like LaRue to enforce the terms of a plan, but — unlike Section 502(a)(2) — neither of these provisions permits the recovery of money damages. *See* 29 U.S.C. §§ 1132(a)(1)(B),(a)(3). To read, as the Secretary suggests we should, § 502(a)(2) to authorize the very sort of individual damages barred by the Supreme Court in *Mertens* and *Knudson*, would render § 502(a)(3)'s limitation on monetary relief a dead-letter. It would also deprive of all meaning the careful distinction Congress drew between plan remedies in § 502(a)(2), and individual remedies in §§ 502(a)(1) and (a)(3).

According to the Secretary, "[*LaRue*] creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits." Br. at 11. That assertion overlooks the actual holdings of the cases cited by the Secretary; it also ignores the decisions of *other* courts of appeals with which the Secretary's interpretation of § 502(a)(2) conflicts. To begin with, each case cited by the Department involved a subset of plan beneficiaries or participants that alleged plan losses. Not a single case involved, as here, an individual plaintiff, much less one who failed to allege a "loss to the plan" as required by Section 502(a)(2).

In *In re Schering-Plough Corp. ERISA Litig.*, for example, the Third Circuit held only that where plaintiffs alleged that *the Plan* suffered significant losses" and requested that fiduciaries "make good *to the Plan* the losses *to the Plan*," they need not "seek[ ] to recover for *all* plan participants allegedly injured by the breach." 420 F.3d 231, 234, 235 (3d. Cir. 2005) (emphasis added). Indeed, the Third Circuit distinguished the very situation presented here: one in which a single plaintiff seeks "to recover damages on his or her own behalf." *Id.* at 239. And, the Secretary's assertions

notwithstanding, Br. at 14, the Third Circuit *did* attach significance to the fact that plaintiffs filed a class action on behalf of a number of plan participants, distinguishing *Russell* on precisely that ground. *Id.* at 241.

Likewise, in *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995), the Sixth Circuit concluded that a subclass of plan participants could sue where the remedy sought by plaintiffs "would benefit the plan as a whole and . . . cure any harm the plan had suffered." Indeed, the *Kuper* court noted that the Sixth Circuit had "repeatedly held that ERISA does not permit recovery by an individual who claims a breach of fiduciary duty." *Id.* at 1452-53. (collecting cases). Similarly, in *Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006), a subset of participants sought "to recover losses to [American Airlines' 401K] $uper $aver Plan." As for *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003), the Seventh Circuit specifically noted that — in contradistinction to § 502(a)(3), the appropriate vehicle for individual relief — § 502(a)(2) requires a loss to the plan. The cases cited by the Secretary thus stand only for the limited proposition that liability under § 502(a)(2) is not limited to losses that accrue to *all* plan participants — it is, however, limited to plan losses.

Indeed and ironically, it is the Secretary's overly broad view of the term "losses to the plan" that creates the circuit split. A number of courts of appeals have stated that individual loss is not cognizable under § 502(a)(2). In *Strom v. Goldman, Sachs & Co.*, for example, the Second Circuit held that an individual plaintiff "cannot proceed under Section 502(a)(2) because it affords no remedies to individual beneficiaries." 202 F.3d 138, 149 (2d Cir. 1999), *abrogated on other grounds by Knudson*, 534 U.S. at 214-15; *see Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (affirming grant of summary judgment under Section 502(a)(2) because plaintiff's allegations "concern only her

individual account"); *see also Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999) ("Under ERISA, damages for breach of fiduciary duty inure to the benefit of the plan as a whole rather than to individuals."); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) ("[P]laintiffs failed to prove a loss *to the plan* as required by 29 U.S.C. § 1109(a)") (emphasis in original); *Parker v. BankAmerica Corp.*, 50 F.3d 757, 768 (9th Cir. 1995) ("Any recovery for a violation of section 1132(a)(2) must be on behalf of the plan as a whole, rather than inuring to individual beneficiaries."); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991) (same); *Tregoning v. American Community Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) ("§ 1109(a) provides relief only for a plan and not for individual participants."); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d. Cir. 1993) ("*Russell* . . . bars plaintiffs from suing under Section 502(a)(2) because plaintiffs are seeking damages on their own behalf, not on behalf of the Plan."); *Physicians HealthChoice, Inc. v. Trustees of Auto. Employee Ben. Trust*, 988 F.2d 53, 54 (8th Cir. 1993) ("The Supreme Court has construed [§ 1109(a)] literally . . . that section [does not] 'authorize any relief except for the plan itself.'") (quoting *Russell*, 472 U.S. at 144).

In ERISA, Congress sought to provide fair and generous remedies for plan participants without imposing ruinous personal liability on plan fiduciaries. That balance pervades the statute, and it is not for us to readjust it. With respect, we think the Secretary's view does recalibrate the balance, and we do not possess authority to modify plain statutory text, several Supreme Court decisions, and the corpus of circuit law on the subject. If the Department believes fiduciaries should face personal liability for every wrong alleged by individual beneficiaries, even in the absence of personal profit or misuse of plan assets, it will have to seek a forum other than this court.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Traxler and Judge Williams (USDJ,ED/VA).

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

No. 2:04-1747-DCN

JAMES LARUE, PLAINTIFF

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INCORPORATED, EMPLOYEES' SAVINGS PLAN, DEFENDANTS

ORDER OF JUDGMENT

On June 23, 2005, the court issued an order granting the Defendants' motion for judgment on the pleading with regard to the Plaintiff's request for equitable relief under E.R.I.S.A. for an alleged breach of fiduciary duty on the part of the Defendant DeWolff Boberg & Associates. As the court noted in its' order of June 23, 2005, that order did not pertain in any way to a separate claim by the Plaintiff in his complaint which sought a statutory penalty for an alleged failure to provide requested information under E.R.I.S.A. and related attorney's fees and costs. The Plaintiff has advised the Court that he will abandon his remaining claim for statutory penalties and related attorney's fees and costs and that he does not wish to burden the Court further with that particular claim. Plaintiff has asked the Court to dismiss that claim with prejudice in light of his abandonment of that particular claim only and the Defendants consent to such

dismissal. Plaintiff has advised the Court that he is only abandoning the statutory penalty claim and the related claim for fees and costs and that he in no way intends to abandon any rights to appeal the issues addressed by the Court's order of June 23, 2005. Because the Plaintiff does wish to abandon his claim for a statutory penalty and related attorney's fees and costs and because the Defendants consent to such dismissal with prejudice, the Court does dismiss that claim with prejudice. However, upon dismissal Plaintiff does retain all rights to appeal or make a motion on the issues raised by the Court's June 23, 2005 order. The effect of this order and the Court's prior order of June 23, 2005 is such that the Plaintiff's entire action is dismissed with prejudice and judgment shall be entered in favor of the Defendants.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that the Plaintiff's complaint is dismissed with prejudice and judgment shall be entered in favor of the Defendants. Each party shall bear its own costs and attorneys fees.

AND, IT IS SO ORDERED.

/s/ DAVID C. NORTON
THE HONORABLE DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

Date: July 5, 2005

APPENDIX E

1. 29 U.S.C. 1002 provides in pertinent part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program–

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant–

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and

as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * * * *

2. 29 U.S.C. 1104(a)(1)(B) provides in pertinent part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

* * * * *

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * * *

3. 29 U.S.C. 1109 provides:

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or

remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

4. 29 U.S.C. 1132(a) provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought–

* * * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *